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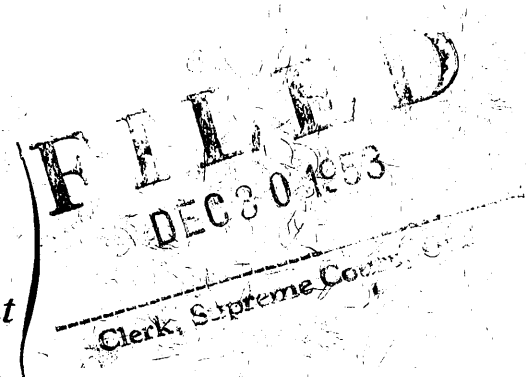
Robert P. Woolley v. Milton S. Wycoff : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH



ROBERT P. WOOLLEY,

Plaintiff and Respondent

vs.

MILTON S. WYCOFF,

Defendant and Appellant

Case No.
8046

RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

Appellant (defendant) sets forth a statement of facts construed most favorably to himself and in conflict with evidence upon which the trial court found in favor of Respondent (plaintiff). However, it appears that the only question upon which Appellant relies on appeal is one of law and does not depend for solution upon the questioned statement of facts. Ac-

cordingly, although Respondent does not wholly agree with Appellant's Statement of Facts, Respondent will set forth only the basic facts as they were found by the trial court in order to point up the law problem which is here presented.

ADDITIONAL STATEMENT OF FACTS

Respondent brought suit and recovered a judgment in the trial court for commissions earned by him as a licensed real estate broker in procuring a tenant for certain of appellant's property pursuant to an employment agreement between the parties. (R. 166, 169)

On or prior to August 1, 1951, Appellant had entered into negotiations with Bessie E. Friedman and Western Salvage Co. for the purchase of certain real estate at 1550 South Second West Street in Salt Lake City. Shortly thereafter Appellant invited Mr. Robert P. Woolley, known by him to be a licensed real estate broker, to his office and advised him that he, Appellant, had an option on the property in question, and then and there orally employed Mr. Woolley to secure a tenant who would be willing to lease a specified portion of the property for a period of 10 years at a rental of $400 per month. Appellant agreed with Respondent that in consideration for procuring such a tenant he would pay Respondent the usual

and customary real estate commission then prevailing in Salt Lake City for such services. (Tr. 26, 27.)

Mr. Woolley went to work and subsequently located a willing tenant, a Mr. A. A. Easton, who was ready, willing and able to enter into the proposed lease on defendant's terms and who so stated to defendant. Thereafter, upon Defendant's assurance that the lease was being drawn by his attorney, Mr. Easton moved an entire gun manufacturing plant from Trinidad, Colorado, into the leased premises. (Tr. 34, 35, 36, 37, 38.) Thereafter defendant refused to exercise his option, left Mr. Easton in the premises without an enforceable lease, and refused to pay Mr. Woolley for his services.

Evidence duly adduced showed that the usual and customary as well as the fair and reasonable broker's commission then prevailing in Salt Lake City for procuring a tenant to lease premises was five per cent of the agreed rental for the first five years of the lease, and three percent thereof for the next five years. (Tr. 48-50.)

The court found in favor of the plaintiff and allowed him the commission agreed upon for procuring a tenant ready willing and able to enter into a lease with the landlord on his terms.

Defendant asserted the Statute of Frauds as an additional defense, specifying in particular Secs. 33-

5-1, 33-5-3, and 33-5-4, U.C.A. 1943, now Sections 25-5-1, 25-5-3, 25-5-4, U.C.A. 1953. It is this question of the Statute of Frauds upon which the present appeal solely rests.

STATEMENT OF POINTS

Point I.

An Agreement of Employment of a Real Estate Broker to procure a tenant is not an "Agreement Employing an Agent or Broker to purchase or sell Real Estate," for the reason that such employment involves only Personal Property, rather than "Real Estate" as that term is used in the Statute of Frauds.

Point II.

An Agreement of Employment of a Real Estate Broker to procure a tenant is not an "Agreement Employing an Agent or Broker to purchase or sell Real Estate," for the reason that such employment does not involve either a purchase or a sale but merely the procuring of a person willing to enter into a further agreement to use and possess property title to which remains with the owner.

Point I.

An Agreement of Employment of a Real Estate Broker to procure a tenant is not an "Agreement Employing an Agent or Broker to purchase or sell Real Estate," for the reason that such employment involves only Personal Property, rather than "Real Estate" as that term is used in the Statute of Frauds.

Although appellant asserted several possible sections of the Statute of Frauds upon which he relied in the trial court, he now premises his argument solely upon Sec. 25-5-4, which is as follows:

> "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:
> * * *
>
> "(5) Every agreement authorizing or employing an agent or broker to purchase or sell *real estate* for compensation." (Emphasis added.)

Appellant having limited his contention to this one sub-section, no purpose would be served in arguing the inapplicability of the other sections relied on at trial.

Appellant contends that but one question is involved in this appeal: "Does the term 'real estate'

contained in the Statute of Frauds, Sec. 25-5-4, include a ten-year lease?"

The problem involved is thus stated too narrowly and overlooks one of Respondent's major arguments.

There are two questions involved:

(1) Does this arrangement relate to "real estate" within the meaning of Sec. 25-5-4(5)?

(2) Does this arrangement constitute employment to "purchase or sell" within the meaning of Sec. 25-5-4(5)?

The transaction here involved does not relate to nor involve "real estate" as that term is used in Subdivision (5) of Sec. 25-5-4, of the Statute of Frauds.

It is generally held by the cases that under a statute such as ours, the term "real estate" does not include within its purview a "lease" of property.

Washington has a statute of frauds substantially identical with our Utah law. Sec. 5825 Rem. Comp. Stat. provides:

> "An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission shall be void, unless the agreement or some note or memorandum be in writing."

This statute came before the Supreme Court of Washington for construction in the case of *Myers* v. *Arthur*, 135 Wash. 583, 238 P. 899, and with respect to it the Court said:

> "Undoubtedly at common law a leasehold, whatever its duration in years, was personal property. The rule, as stated in 35 R.C.L. 970, supported by abundance of cases, is:
>
> > 'Except in so far as the common-law rules may have been modified by statute, terms for years, however long, are chattels real, falling within the classification of personal property and governed by the rules of law applicable to other kinds of personal property.'
>
> "*. . . the statute applicable to the present case says only 'real estate', and does not include the words 'interest in real estate.'* And, as stated in *American Savings Bank and Trust Co.*, v. *Mafridge*, supra, an assignment of a lease for a term of years was not required to be acknowledged, because we had no statute providing for it, so here it cannot be held that an agreement employing an agent or broker to sell or purchase a lease of real property for a term of years must be in writing, because we have no statute requiring it. The statute invoked by the appellant relates to no kind of property other than real estate." (Emphasis added)

The Washington Court, thereafter, in the case of *Johnson* v. *Rutherford*, (1948), 200 P. 2d 977, squarely affirmed this same proposition in a case in

which it held that a leasehold interest in a tavern premises was not "real estate" within the statute requiring agreements employing a broker to sell real estate to be in writing.

In the case of *O'Neill* v. *Wall*, 103 Mont. 388, 62 P. 2d 672, the Supreme Court of Montana had before it a problem stated as follows:

> "The question is thus presented, Is a contract employing a broker or agent to induce others to enter into an option or lease, or a lease and option, required by the statute to be in writing."

After citing and considering various authorities on the subject, the Court concluded:

> "Thus it appears that a lease is not real estate, and accordingly a broker's contract to procure or sell a lease is not within the statute and need not be in writing."

In the case of *Dabney* v. *Edwards*, 5 Cal. 2d 1, 53 P. 2d 962, the California Court went into the question of what does and what does not constitute real estate, in a case involving an oral contract to sell oil leases. The statute involved was as follows:

> ". . . an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid, unless the same or some note or

> memorandum thereof is in writing and subscribed by the party to be charged or by his agent . . ."

The Court held that a lease for a period of ten years was personal property and not real estate within the meaning of the statute.

In the case of *Guy* v. *Brennan*, 60 Cal. App. 452, 213 P. 265, an earlier case involving the same statute the Court said:

> "Appellants' second point is that the contract of employment, which was oral, was invalid under that provision of our statute of frauds which provides that an agreement employing an agent or broker to sell 'real estate' for compensation or commission is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged, or by his agent . . ."
>
> * * *
>
> ". . . a lease for years, though a chattel real, is personal property, and therefore, though it may be an estate or interest in real property, its is not such an estate or interest as is connoted by the words 'real estate' ".

For another similar holding see the case of *Linde* v. *Huene*, 205 Cal. 569, 271 P. 1087, wherein the plaintiff sued to recover compensation under an oral contract to procure a tenant for an apartment building. The Court in ruling favorably to the plaintiff said:

> ". . . The contract for their employment or compensation was not required to be in writing by the terms of subdivision 6 of Section 1624, Civil Code, which applies only to agreements authorizing or employing an agent or broker to purchase or sell real estate."

For similar holdings, see: *Spalding* v. *Bennett*, 93 Cal. App. 577, 269 P. 948; *Albertson* v. *Warner*, 60 Cal. App. 2d 595, 141 P. 2d 246; and *Barr* v. *Campbell Mill Co.*, 154 Wash. 83, 280 P. 929.

An annotation at 103 ALR 833 which collects the cases on the subject, states the rule to be:

> "Where . . . the statute applies only to 'real estate', it is generally held that it does not cover leases for a definite term of years."

The argument which Appellant makes for applicability of the Statute of Frauds to the present situation, is based upon Sec. 68-3-12 (10) U.C.A. 1953, wherein certain terms are defined as follows:

> "In the construction of these statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute.
>
> (10). The terms 'land' 'real estate' and 'real property include land, tenements, hereditaments, water, rights, possessory rights and claims."

It is submitted that the general construction statute is here totally and completely inapplicable by its own terms. The statute is to be used only as an aid to construction when its use would not be inconsistent with the manifest intention of the legislature and when it would not be repugnant to the context of the statute. In the present instance to use the general statute to define terms of art used in a special statute would be both inconsistent with the manifest intention of the Legislature and repugnant to the clear meaning of the statute.

Observe the development of the various sections of the Statute of Frauds, with relation to real property. And observe their interrelation with each other and their physical position or context in relation to each other in the statutes.

Section 25-5-1, U.C.A. 1953, recites that:

> "No *estate or interest in real property*, other than a lease for a term not exceeding one year . . . shall be created, granted, assigned, surrendered or declared otherwise than by operation of law, or by deeds or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." (Emphasis added)

The Legislative history of this section dates back to Comp. L. 1876, Sec. 1010.

Sec. 25-5-3, U.C.A. 1953, recites:

> "Every contract for the leasing for a longer period than one year, or for the *sale of any lands or any interest in lands*, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing." (Emphasis added)

This section so far as it relates to "lands or any interests in lands' is identical with Sec. 3918 (5) 2 Comp. L. 1888.

The next Section in the series is Sec. 25-5-4 (5), U.C.A. 1953, which provides:

> "In the following cases every agreement shall be void unless such agreement or some note or memorandum thereof is in writing subscribed by the party to be charged therewith:
>
> (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation."

In 1909, when subdivision (5) of Sec. 25-5-4, was added, therefore, the Legislature had before it two divisions of the Statute which had been in existence for many years, and in which the Legislature had, in that chapter, specifically indicated the in-

stances in which it wanted "interests in lands" or "interests in real property" to be controlled by those statutes in addition to the "land" or "real property" itself.

With this legislative background it is unmistakably clear that when the Legislature, enlarged the scope of the statutes dealing with real property, as it did in 1909, and specifically excluded reference to "interests in real property," therefrom, it intended that "interests in real property" should not be included within this section. Elimination of the additional language "interests in real property," from Subdivision (5), when "interests in real estate" were included in the other sections, would appear to be conclusive of the question of what the Legislature meant and of immeasurably greater help in determining what was meant by particular words, than a general statute, enacted without particular reference to any subject. The context is clear, both in the statute itself, and in its juxtaposition with the other statutes relating to real property, and to ascribe to the words "real estate" a meaning which would broaden it far beyond its ordinary and accepted meaning as a term of art would be repugnant to the clear intent of the Legislature.

Beyond the foregoing considerations, to affix to subdivision (5) the expanded meaning which appellant suggests would be to create the anomalous situa-

tion where a lease for a term of one year or less would be specifically excluded from operation of the other sections of the Statute, (Sec. 25-4-1 and 3) and yet an agent or broker would be precluded from recovering on a contract to procure a tenant to enter into such a lease. To give the term "real estate" the expanded meaning which appellants seek to ascribe to it, would be to hold that this anomalous and inconsistent result is what the Legislature intended in enacting Sec. 25-5-4 (5). See *Guy* v. *Brennan*, 60 Cal. App. 452, 213 P. 265.

Yet another reason exists why the general statute (Sec. 68-3-12 (10), should not be applied to expand the meaning of the term of art "real estate" in this instance.

Subsection 9 of the same Section provides:

> "(9) The word "property" includes both real and personal property."

Subsection (11) provides as follows:

> "(11) *The term 'personal property' includes every* description of money, goods, chattels, effects, evidences of rights in action, and *all written instruments by which any* pecuniary obligation, *right or title to property is created*, acknowledged, transferred, increased, defeated, discharged or diminished, *and every right or interest therein.* (Emphasis added)

If these sections are thus read together, it is apparent that the lease here involved is by definition equally as much "personal property" under these sections as it could possibly be "real estate" by application of Section (10).

Point II.

An agreement of Employment of a Real Estate Broker to procure a tenant is not an "Agreement Employing an Agent or Broker to purchase or sell Real Estate," for the reason that such employment does not involve either a purchase or a sale but merely the procuring of a person willing to enter into a further agreement to use and possess property, title to which remains with the owner.

Respondent takes the position that regardless of the holding of this Court with respect to a determination of whether or not a lease would or would not be "real estate" within the meaning of Sec. 25-5-4(5), in any event the language "purchase or sale" cannot be expanded properly or legally to include a contract to obtain a tenant who is willing thereafter to enter into a mere lease with the owner.

This proposition has been specifically passed upon in the case of *Klie* v. *Hollstein*, 98 N.J.L. 473, 120 A. 16, wherein a broker brought suit for commission for procurement of a lessee for a factory property from the defendant. The Statute of Frauds provided:

> "No broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing and signed by the owner or his authorized agent."

The Court said:

> "Now the contract in suit is not one to pay commission for "selling or exchanging land," On the contrary, it is an agreement to pay the plaintiff for procuring a lessee for defendant's real estate. . . Such agreement is not within the statute of frauds and hence is not required to be in writing."

Again, in *Miller Co.* v. *Woolsey*, (N.J.) 128 A. 540, the Court said:

> "The statute of frauds requiring that the authority for selling or exchanging lands be in writing has no application to a contract for compensation for procuring a lease."

And in *Burt* v. *Brownstone Realty Co.* (N.J.) 112 A. 883, the Court said:

> ". . . the argument under this point is predicated upon the assumption that the agreement under consideration is a contract between an owner and a broker and within Sec. 10 of the statute of frauds; but, as we have already intimated, we do not take this view. It is not an agreement to pay 2% on the purchase price for the services of a broker in effecting a sale; on the contrary, it is an agree-

> ment to compensate the real estate agent for negotiating a lease and endeavoring to collect the rent as it falls due; . . . *This makes the instrument as between the parties merely a contract at common law to pay certain sums of money in consideration of certain specified services, not including the effecting of a sale. .*" (Emphasis added.)

So, in the present case, all the contract embraced was that Mr. Woolley, would render services in locating a tenant who would be willing to contract with the defendant as the continuing owner of the land.

The cases are numerous which indicate in all fields of legislation that leasing has been distinguished from purchasing or selling real estate.

In *Gulf Refining Co. v. Glassell*, 186 La. 190, 171 So. 846, the Court noted that the distinction between a sale of real estate and a lease of real estate lay in the fact that sales of property include both title and right to possession and is fundamentally different from a lease which grants only the use and enjoyment of the thing leased.

A long term lease with the payment of an annual rent has been held not a sale, which is a grant of ownership, in the case of *Chicago Aud. Assoc.* v. *Cramer*, 8 F. 2d 998.

For other cases with similar holdings distinguish-

ing a lease from a sale see the following: *Lundberg* v. *Bennett*, 117 Neb. 66, 219 N.W. 851; *Logan* v. *State Gravel Co.*, 158 La. 105, 103 So. 526; *State* vs. *Evans*, 99 Minn. 220, 108 N. W. 958.

Further support for the proposition that obtaining a tenant is not a purchase or sale is to be found in the following cases:

In *Lind* vs. *Huene*, (Calif.) 271 P. 1087, there was involved a claim by a broker for commissions under an oral contract to secure a lessee. The Court in reviewing the application of Sec. 1624 (6) of the California Code said:

> ". . . In the instant case the brokers were not authorized to sell or exchange the property, but only to procure a lessee. The contract for their employment or compensation was not required to be in writing by the terms of subdivision 6 of section 1624, Civil Code, which applies only to agreements authorizing or employing an agent or broker to purchase or sell real estate."

And in *Spalding* v. *Bennett*, 93 Cal. App. 577, 269 P. 948, where there was an oral agreement to pay a specified sum for procuring a lessee the Court said:

> "The transaction is not within the provisions of the statute of frauds, since it was neither an agreement to purchase nor sell real estate, which in the absence of a memorandum in writing is prohibited by section 1624 of the Civil Code and Section 1973 of the Code of Civil Procedure.

SUMMARY

This Court has heretofore in the matter of *Case* v. *Ralph*, 56 Utah 243, 188 P. 640, extended the language of Sec. 25-5-4 (5) to cover the employment of a broker to procure a purchaser of real estate, as distinguished from the employment of a broker to himself directly purchase or sell real estate.

What Appellant now asks the Court to do is to make three further extensions of the language of this Section by construction, as follows:

1. To extend the term "real estate" to cover mere personal property and possessory interests notwithstanding the language of the statute does not contain the term "interest in real estate."

2. To extend the term "purchase or sell" to cover the mere employment of a broker to procure a person willing to buy or sell a leasehold interest as distinguished from purchasing or selling the interest in the name of the broker. (This would amount to an extension of the doctrine of *Case* v. *Ralph* to a situation not here directly involved but necessarily included by implication, to-wit, a situation where the land owner either owns an existing lease which he desires to sell, or is aware of an existing lease which he desires to purchase and acquire by assignment.)

3. To extend the term "purchase or sell"' to cover the mere employment of a broker to procure a person not merely willing to buy or sell an existing lease or leasehold interest, but willing initially to enter into a new lease as tenant from the owner—a transaction which is entirely separate and distinguishable from a purchase or a sale and never partakes of or results in a buy or sell transaction either by the broker or by the owner.

Plain every-day language such as "real estate" and "purchase or sell" does not properly or legally lend itself to such judicial legislation as would be required to embrace within the meaning of the statute the three separate extensions here suggested to the Court. Clear and unambiguous language would thus be distorted far beyond its normal and accepted meaning.

Perhaps the situation is best summarized by a quotation from a book review written by Professor Arthur L. Corbin, Townsend Professor of Law, Emeritus, of Yale Law School, appearing in the June, 1953, number of the Yale Law Journal:

> "Ancient statutes can be wholly forgotten, or substantially emasculated by judicial and administrative action. The Statute of Frauds, enacted by Parliament in 1677 and re-enacted in substance by all of the United States, has been subjected to so many thousands of variable and inconsistent judicial interpretations

and applications that a court now looks to the current of decisions rather than to the Statute. If these decisions have, as many competent critics believe, turned the Statute into an instrument for the encouragement of repudiation instead of the prevention of fraud and perjury, is it not time to look back to the words of the Statute itself rather than to the aberrant applications?"

Respectfully submitted,

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